BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GREGORY A. BLUE	)	
Claimant	)	
VS.	)	
	)	Docket No. 236,567
LSC	)	
Respondent	)	
AND	)	
	)	
AMERICAN FAMILY MUTUAL INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the preliminary hearing Order dated November 3, 1998 entered by Administrative Law Judge Jon L. Frobish.

ISSUES

After conducting a hearing, the Judge ordered temporary total disability compensation "beginning August 12, 1998 and continuing until Claimant is released to substantial and gainful employment." Respondent seeks review of the Judge's findings and conclusions concerning "whether the claimant suffered an accidental injury, whether the injury arose out of and in the course of [the] employee's employment with respondent, and whether notice was given." Also, in its brief, respondent raises an issue concerning whether the Judge had jurisdiction to enter the November 3, 1998 Order. In addition, claimant argues this appeal does not give rise to an issue that the Appeals Board has jurisdiction to consider.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After an initial preliminary hearing held on October 8, 1998, the Judge ordered all outstanding medical bills to be paid as authorized medical and for respondent to submit a list of three physicians from which claimant then selected one to provide him with authorized medical treatment. The claimant's request for temporary total disability benefits was denied, but the October 9, 1998 Order went on to state that "[t]he Claimant will be entitled to temporary total disability in the event the treating physician finds the Claimant

to be incapable of substantial and gainful employment." The October 9, 1998 preliminary hearing Order was not appealed.

On October 30, 1998, claimant served a Notice of Rehearing on respondent that stated a rehearing on the preliminary hearing was scheduled for November 3, 1998. Attached to this Notice of Rehearing were copies of medical records from an unauthorized physician, Dr. Michael P. Estivo, pertaining to claimant's low back, right hip and right knee injuries. These records included a recommendation for a right knee arthroscopy and the October 16, 1998 report also contained an opinion by Dr. Estivo concerning claimant's work status:

> "Based on what I see today, I feel that it would have been reasonable for him to have been off of work since his injury. I would recommend that he remain off of work at this time."

Claimant was injured at work on August 12, 1998 when he fell into a hole that was about four feet deep and three feet wide. At the October 8 preliminary hearing, respondent disputed that claimant suffered personal injury by accident as alleged. But the claim was found compensable. At the November 3 rehearing, respondent disputed that claimant injured his right knee in that accident. Whether claimant's right knee injury was the result of a work-related accident is a jurisdictional issue because it gives rise to a disputed question of whether claimant's injury arose out of and in the course of his employment.[1] Thus, the causation of claimant's knee injury is the issue, not the nature and extent of any resulting disability from that injury.[2]

Claimant argues that the only issue at the November 3, 1998 rehearing dealt with claimant's entitlement to temporary total disability benefits. Therefore, because K.S.A. 44-534a grants an ALJ the jurisdiction to decide issues dealing with ongoing medical treatment and temporary total disability compensation, it cannot be said that the ALJ exceeded his jurisdiction in awarding benefits. In addition, whether or not claimant is temporarily and totally disabled is not an issue listed in K.S.A. 44-534a as jurisdictional and subject to review by the Appeals Board on an appeal from a preliminary hearing order. Claimant seems to argue that because the ALJ found the claim to be compensable following the October 8, 1998 preliminary hearing that the ALJ was limited to the issue of claimant's entitlement to temporary total disability benefits at the November 3, 1998 rehearing. The Appeals Board disagrees.

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[1] K.S.A. 1998 Supp. 44-534a.

[2] *See*, Tinoco v. J. C. Penney Company, Inc., Docket No. 228,844 (August 1998).

As provided by the Workers Compensation Act, preliminary hearing findings are not final or binding but, instead, are subject to modification upon a full hearing on the claim.[3] And, as there is no limit to the number of preliminary hearings that may be conducted during the trial of a workers compensation case, this would apply to subsequent preliminary hearings and rehearings as well. Claimant may not dictate the terms of a preliminary hearing or limit the issues to be discussed. Just as claimant sought to introduce new evidence concerning the issue of his entitlement to temporary total disability compensation, respondent was free to re-argue the compensability of the injury. Generally, however, where the compensability issue has already been decided at a preliminary hearing, the issue would not need to be addressed again absent new evidence or a legal theory not previously presented. Of course the extent to which these issues are to be relitigated at a subsequent preliminary hearing or rehearing is within the discretion of the ALJ.

In this case respondent argues that the compensability issue is new because at the October 8, 1998 hearing claimant was requesting benefits for a low back and hip injury whereas at the November 3, 1998 hearing or rehearing claimant was alleging he was temporarily and totally disabled as a result of an injury to his knee. In fact, the record of the October 8 hearing shows that claimant described injuring his back, hip, and right leg in the August 12, 1998 accident. And in the exhibits introduced at that hearing, the knee is specifically mentioned. The October 6, 1998 medical records mention the knee and include a referral to orthopaedic surgeon Michael P. Estivo, D.O. By the time of Dr. Estivo's October 16, 1998 examination, right knee pain is one of claimant's chief complaints. Although claimant's discovery deposition testimony and the initial medical treatment focused on the claimant's back and leg symptoms, the knee injury is also a part of this claim. It is not clear to what extent claimant's leg symptoms may be the result of an injury to the knee as opposed to the back, but the ALJ was nonetheless persuaded that the knee injury was caused by claimant's fall at work as described. Based upon its review of the record compiled to date, the Appeals Board agrees with that conclusion.

Next, respondent argues that the Judge was without jurisdiction to award benefits pursuant to claimant's Notice of Rehearing because the procedural requirements of K.S.A. 44-534a(a)(1) were not followed and because there are no provisions in the Workers Compensation Act that permit a motion for rehearing, citing Waln v. Clarkson Constr. Co., 18 Kan. App. 2d 729, 861 P.2d 1355 (1993) and the Board's decision in Cushenberry v. Wal-Mart, Docket No. 199,674 (June 1997). First, neither Waln nor Cushenberry involved a preliminary hearing. Waln dealt with a post-award proceeding for penalties under K.S.A. 1992 Supp. 44-512a. The Court of Appeals specifically pointed out that this was not a preliminary hearing proceeding under K.S.A. 44-534a. In paragraph 2 of its Syllabus, the Court held:

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[3] K.S.A. 1998 Supp. 44-534a(a)(2).

> There is no provision in the Workers Compensation Act for motions for a new trial, rehearing, or other post-judgment motions. An administrative law judge may not rehear a claimant's request for K.S.A. 1992 Supp. 44-512a civil penalties after initially denying such request.

Cushenberry dealt with an award on review and modification. Although Waln was cited, the Board's decision turned instead on whether the appellant's request was a proper subject for a nunc pro tunc. The question concerning the propriety of a motion for rehearing before the ALJ was rendered moot by the Board's de novo review jurisdiction of the underlying issue.

Second, the Board has previously allowed motions for rehearings of preliminary hearings. *See*, McGee, Jr. v. Capitol Electric Construction of Kansas, Inc., Docket Nos. 206,931 and 210,663 (November 1997); Conti v. IBT, Inc./Sunrise Systems, Inc., Docket No. 162,310 (May 1994). In McGee the Board found respondent did not have notice that new medical evidence would be offered and did not have the opportunity to dispute that new medical evidence. Therefore, the notice was held to be defective and another preliminary hearing should be held. Those facts are not present here.

Respondent does not specify which procedural requirements of K.S.A. 44-534a were not followed except to say that a new application was not filed. The seven day notice requirement is not mentioned. Furthermore, no objection to proceeding with the rehearing appears in the November 3 hearing transcript.

The Kansas Supreme Court has stated that an important objective of workers compensation law is avoiding cumbersome procedures and technicalities of pleadings so that a correct decision may be reached by the shortest and quickest possible route.[4] Further, the Division is not bound by technical rules of procedure but should give the parties reasonable opportunity to be heard and to present evidence, insure an expeditious hearing, and act reasonably and without partiality.[5]

The Board has previously held, and continues to hold, that the Division retains jurisdiction over the parties and the issues presented at the initial preliminary hearing. Therefore, later hearings conducted to address those same preliminary hearing issues are treated as a continuation of the initial hearing. That interpretation of the Act affords the parties expeditious hearings and avoids cumbersome procedures that would only serve to delay prompt decisions.

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[4] Pyeatt v. Roadway Express, Inc., 243 Kan. 200, 756 P.2d 438 (1988).

[5] K.S.A. 44-523(a); Pyeatt.

If an appellate court would find that a party must file a new application for a preliminary hearing and a new notice of intent every time a hearing is needed to address an ongoing preliminary hearing issue that already has been addressed, the Appeals Board finds that claimant substantially complied with that requirement by serving the Notice of Rehearing with the exhibits attached evidencing a need for preliminary hearing benefits.

Finally, respondent's application for review also alleged an issue concerning whether notice was given. Notice was not made an issue at either hearing and there was no mention of this issue in respondent's brief. Thus, if this was an issue it appears to have been abandoned.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order dated November 3, 1998 entered by Administrative Law Judge Jon L. Frobish should be, and is hereby affirmed.

IT IS SO ORDERED.

Dated this ____ day of February 1999.

BOARD MEMBER

c: Dale V. Slape, Wichita, KS
William L. Townsley, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director